Wherefore, petitioners pray the allowance of your writ of certiorari to the Supreme Court of Illinois to the end that the cause herein may be reviewed and decided by this Court, and that the decree and orders herein may be reversed, and for such relief as this Court may direct.

WEIGHTSTILL WOODS,
Counsel for Petitioner.

Supporting Brief For Petitioner.

(A-1) The Constitution of Illinois vests the legislative sovereignty over the County affairs of Cook County in "The Board of County Commissioners of Cook Cunty," by a special section of that constitution.

Section 7 of Article 10, Constitution of 1870.

(A-2) That sovereign legislative power is co-ordinate with and beyond the jurisdiction of every Court and State's Attorney and the Legislature of Illinois.

Article III, Constitution of Illinois, 1870.
Cummings v. *Smith*, 368 Ill. 94, 103.
Ottawa Gas Light Co. v. *People*, 138 Ill. 336, 343.
People v. *Czarnecki*, 265 Ill. 489.
Krueger v. *Zender*, 332 Ill. 519.
Helliwell v. *Sweitzer*, 278 Ill. 248.

(A-3) This Court will take judicial notice that the population of Cook County is more than four million people and more than half the population of the State of Illinois.

(A-4) By sovereign acts of legislation, which are shown by this record, the County Board of Cook County, expressly authorized the 818 civil tax litigations which were con-

ducted by petitioner Winston, in courts of record in Cook County, and also authorized said contract of employment, which was made with the express approval in writing by the then State's Attorney of Cook County.

County proceedings at pages and dates herein mention: 4/27/32 page 1207—12/5/32 page 60, 68—12/12/32 page 74

Cummings v. *Smith*, 368 Ill. 94, 103.

(A-5) Said contract directs and empowers Winston to perform legal services and administrative action at court. That action every attorney and counsellor-at-law is authorized by his license from the Supreme Court of Illinois, to carry on at the request of the client who has control over such litigation. The *preparation and conduct of such litigation at court for Cook County as client*, is not in any sense of the term any act of sovereignty, and does not involve any essential power vested in the State's Attorney of Cook County by the Constitution of Illinois.

Chapter 13, Section 1, Illinois Revised Statutes.
Article 6, Section 22, Constitution of Illinois 1870.
Ottawa Gas Light Co. v. *People*, 138 Ill. 336, 343 (1891).
Howard v. *Burke*, 248 Ill. 224, 228 (1910).
Wilson v. *County of Marshall*, 257 Ill. App. 220, 223 (1930).
People v. *Straus*, 266 Ill. App. 95 (1932); Affirmed by *People* v. *Straus*, 355 Ill. 640 (1934).

(B-1) The Statutes of Illinois *pertaining to revenue* for all taxing bodies (Chapter 120 of Illinois Revised Statutes), specifically confirm the power of *the County Board and no one else* to manage and conduct all litigation *for collection of delinquent taxes* by court proceedings.

Illinois Revised Statutes as amended June 17, 1917, Chapter 120, Sections 230, 253, 254, 156 to 161, 183, 255, 292 (See Appendix to this petition at page 39 for an example).
Ottawa Gas Light Co. v. *People,* 138 Ill. 336, 343.
Article III, Constitution of Illinois, 1870.

(B-2) The statute is specific that the *County Board* means "The Board of County Commissioners of Cook County," Chapter 120, Section 292.

(B-3) The County Board has control of many funds that are applicable to payment for legal services under this contract, in addition to penalties and taxes exceeding Sixteen Million Dollars, cash funds collected and paid into the County Treasurer by efforts of petitioner.

Section 705, Chapter 120, Ill. Rev. Statutes.
People v. *Kawoleski,* 310 Ill. 498, 501.
Tearney v. *Harding,* 335 Ill. 123 at 128.

(C-1) No tax statutes which name the State's Attorney as an enforcing officer were ever effective as to this case. The "State's Attorney" was named as enforcing officer in the delinquent Tax Act Laws of 1935, page 1168. All suits and acts by Winston were before that date. And that law was expressly repealed by the present Revenue Law approved May 17, 1939. The "State's' Attorney" was named as enforcing officer in the delinquent Tax Act dated July 26, 1939, at Section 6, and also in the delinquent Tax Act July 10, 1941, at Section 6, but these laws are limited to counties with a population *less than* 500,000 *people;* they were never applicable to Cook County.

(C-2) The State's Attorney of Cook County is referred to in the County Assessors Act, Laws of May 15, 1933, Section 46. But prior to enactment of Section 1 of act of July 24, 1943, the State's Attorney of Cook County is not

mentioned anywhere in the Revenue Act of Illinois. All suits and acts by Winston were *before* any of these dates.

(C-3) There was no common law "State's Attorney." There are no common law powers of State's Attorney. The State's Attorney provided for by the Constitution of 1870 of Illinois, was a new office. Constitution does not specify any duties of that office (Tr. 57).

Revised Statutes of Illinois 1845, Chapter 12.
Constitution of Illinois 1870, Article VI, Section 22.

(C-4) Neither the State's Attorney nor any one else has any power whatever to conduct civil litigation about *collection* of delinquent taxes, separate and apart from said specific statutes which vest in the County Board, authority to initiate and all conduct of such litigation.

People v. *Biggins*, 96 Ill. 481 (1880).
Ottawa Gas Light Co. v. *People*, 138 Ill. 336, 343 (1891).
Wilson v. *County of Marshall*, 257 Ill. App. 220, 223 (1930).
People v. *Straus*, 266 Ill. App. 95 (1932); Affirmed by *People* v. *Straus*, 355 Ill. 640 (1934).

(C-5) Only the County Board may authorize the office or employment of an assistant State's Attorney or Special Attorney. Only the County Board may provide compensation for such office or employment or personal service.

Dalby v. *People*, 124 Ill. 66 at 75.
Section 64 Fortieth, Chapter 34; Ill. Rev. Stat.
Section 18, Chapter 53, Illinois Revised Statutes.
Section 24, Article V, Constitution of Illinois.
People v. *Hanson*, 290 Ill. 370, 373.

Lavin v. *Board of Commissioners,* 245 Ill. 496, 503ff.

Tearney v. *Harding,* 335 Ill. 123, 127.

(D-1) The primary duty is obligatory upon all courts, both state and national, to hear and determine assertions upon the Bill of Rights and other constitutional questions and federal questions, which are presented by the record.

Article VI of the Constitution of the United States (Second Paragraph).

West Chicago Street Railway Co. v. *Illinois ex rel. Chicago,* 201 U. S. 506 at 519-520.

Coombes v. *Getz,* 285 U. S. 434.

(D-2) The orders dated September 23rd, 1943, and October 24th, 1934, as adhered to on November 11, 1943, by the Supreme Court of Illinois, are now final for purposes of review by this Court.

Georgia Ry. and Power Co. v. *Decatur,* 262 U. S. 432.

Central Union Telephone Company v. *City of Edwardsville,* 269 U. S. 190.

(D-3) Said orders are void and outlaw because they seek to destroy contract and property rights of your petitioner shown by this record to be vested before this suit was begun by Thomas J. Courtney on July 15, 1933.

People ex rel Eitel v. *Lindheimer,* 371 Ill. 367, 308 U. S. 505 and 636.

Home Building & Loan Association v. *Blaisdell,* 290 U. S. 398 at 431.

(E) By decisions of Supreme Court of Illinois, through all the decades prior to the judgment and decree now appealed from, the Constitution and Statutes as to powers

of County Board, and duties of State's Attorney as to civil litigation, have always sustained the sovereign power and legislative actions of the County Board.

These sovereign acts of legislation have provided for employment of and for payment of County Attorneys, Assistant State's Attorneys, and Special Attorneys, to attend to all manner of litigation authorized by counties in Illinois, independent of any action therein by the State's Attorney of such a County. As a contemporaneous construction, such legislation and administration is binding upon all branches of the government of Illinois.

Cook County Budget for 1931 and prior years.
Ottawa Gas and Light Co. v. *People*, 138 Ill. 336, 343 (1891).
County of Franklin v. *Layman*, 145 Ill. 138; affirming 43 Ill. App. 163.
Cook County v. *Healy*, 222 Ill. 310, 317ff (1906).
Howard v. *Burke*, 248 Ill. 224 at 228 (1910).
Galpin v. *City of Chicago*, 269 Ill. 27 at 41 (1915).
Tearney v. *Harding*, 335 Ill. 123 at 127 (1929).
People v. *Straus*, 266 Ill. App. 95 (1932); Affirmed by *People* v. *Straus*, 355 Ill. 640 (1934).

(F-1) By contemporaneous construction such legislation and administration is binding in favor of Winston, against all branches of the government of Illinois.

Cook County Budget for 1944 and all prior years.
Nye v. *Foreman*, 215 Ill. 285 at 288 (1905).
Howard v. *Burke*, 248 Ill. 224 at 228 (1910).

(F-2) And the Legislature of Illinois by Statute in 1912 and re-enactment in 1929 had reaffirmed all that court construction of statute and constitution for years before the Winston contract was made.

Section 18 of Chapter 53 and Section 129 and 179 of Chapter 46, of Illinois Revised Statutes.

(F-3 There is even stronger confirmation and independent continuous assertion by the legislature of Illinois, in its special law for appointments to office by Cook County Commissioners, enacted June 15, 1893 Revised 25, 1913, Chapter 34, Section 64, Fortieth and Firty-third. These laws were re-enacted July 21, 1941 and July 15, 1943, as Sections 64:29 and 52 of Chapter 34 (Smith-Hurd Illinois Annotated Statutes—Pocket part for 1944, page 43.) Continuously since June 15, 1893 this Illinois Statute has provided for "*the county attorney, the county architect,* the committee clerk of the County Board, the county purchasing agent" and other employees to be appointed by the County Board.

(F-4 Without need to rely upon that statute, the Supreme Court of Illinois ordered the County of Cook to pay the County Architect, as an exercise of County power and duty under Section 7 of Article 10 of Constitution of Illinois 1870.

Hall v. *County of Cook,* 359 Ill. 528.

(F-5) It is arbitrary denial of equal protection of law, impairment of contract, a taking of vested property by judicial act *ex post facto* without benefit of purchase by eminent domain, and a denial of due process of law, for theSupreme Court and Circuit Court of Illinois, to rule against petitioner whose position is indistinguishable from that of said County Architect.

Statement as to Jurisdiction.

The assignment of errors in the record filed before the Supreme Court of Illinois, and the petitions for rehearing in that Court, summarize the Constitutional and Federal questions presented to that Court and to the Circuit Court of Cook County. There was impairment of contract and

denial of due process of law and denial of equal application of law. Petition for rehearing was denied by the Supreme Court of Illinois on November 11, 1943. Upon an application to this Court for an extension of time to file this petition, an order was entered February 5, 1944 in this Court, extending the time until March 13, 1944. Timely application for review by this Court is made by filing this petition on or before March 13, 1944. This petition is presented in accordance with Section 237(b) of the Judicial Code as amended, and Rule 38 of this Court as amended.

Demorest v. *City Bank Farmers Trust Company*, 64 S. Ct. 384 at 388.

Snowdon v. *Hughes*, 64 S. Ct. 397 at 401.

Upon each appeal (1934 and 1943), your petitioner Winston contended before the Supreme Court of Illinois, that the law to govern this case was thoroughly settled by Constitution and by prior statutes and earlier decisions of the Supreme Court of Illinois. On the first appeal (No. 22412 taken by the State's Attorney of Cook County) the Supreme Court of Illinois said:

> "A construction of the Constitution is involved, and so, regardless of argument pertaining to other elements of jurisdiction, this Court has jurisdiction, and the motion to transfer will be denied."

That Court at that time (October 24, 1934) reversed the dismissal order that had been entered against the State's Attorney suit by the Circuit Court of Cook County, and remanded the case to that Court. There being no final order at that date, this record could not then be brought to this Court for review. *Georgia Ry. and Power Co.* v. *Decatur*, 262 U. S. 432. Later (after remandment and further proceedings) the present appeal was taken in the year 1943 to the Supreme Court of Illinois, by your petitioner.

ARGUMENT FOR PETITIONER.

Statement of the Case.

At an election held in November 1932, Thomas J. Courtney was elected as State's Attorney for Cook County Illinois. In December 1932 (as successor to John A. Swanson) he entered upon the duties of that office. An Information in the nature of a bill in equity for injunction was filed July 22, 1933, by "Thomas J. Courtney as State's Attorney for the said County of Cook for the people of the State of Illinois, and in the name and by the authority thereof, and on the relation of himself as a resident and taxpayer of said County of Cook in behalf of himself as such taxpayer and other taxpayers of said County similarly situated." (Tr. 1.) An amended Information and thereafter a second amended Information were filed (Tr. 2-16). Winston and all members of the County Board, defendants named in said Informations, filed demurrers which were sustained by the Circuit Court by order entered December 15, 1933 (Tr. 21-22). The State's Attorney elected to stand upon said amended Information and thereupon the same was dismissed (Tr. 22).

By opinion on the first appeal (*People ex rel Courtney* v. *Ashton,* 358 Ill. 146, 148) that Supreme Court stated the substance of the Information as follows:

> "The people of the State of Illinois, on the relation of Thomas J. Courtney, State's Attorney of Cook County, and on his relation individually as a resident and taxpayer of that County, filed in the Circuit Court of Cook County two Informations against the members

of the Board of Commissioners of Cook County, the County Treasurer, the County Clerk, and certain attorneys therein named as defendants, seeking to enjoin the payment to the attorneys of county funds under alleged contracts entered into between the County Board and those attorneys.

* * * * * *

"The Informations averred that Courtney is the State's Attorney of Cook County, and that on the 22nd day of May, 1931, and on June 6, 1932, the Board of Commissioners, without power or authority, went through the form of passing resolutions which are set out in the Informations, attempting in case No. 22412 to employ Henry M. Ashton and others to prosecute suits and collect delinquent real estate taxes and to authorize him to appear on behalf of and represent the people of the State and the County of Cook as attorney and solicitor, and fixed his compensation on a contingent basis. By amendment Edward M. Winston was substituted for Ashton. * * * The Informations allege that these contracts were *ultra vires* the power of the board and null and void. * * *"

And that Supreme Court stated the defense as follows:

"The defendants (Ashton-Winston-and all members of the County Board) filed a general and special demurrer to each of the Informations, which demurrers were sustained, and, plaintiff in error abiding the Informations, they were dismissed." (P. 149.)

On that appeal the cause was reversed by Supreme Court of Illinois, in the case of *People* v. *Ashton,* Cause 24212, and remanded to the Circuit Court of Cook County, with directions to overrule said demurrer (Tr. 22). Thereafter Thomas J. Courtney on April 19, 1935 filed his amendment and supplement to the aforesaid amended Information (Tr. 22-25).

By said various Informations Thomas J. Courtney as said informant sought to have declared *ultra vires*, certain

agreements incorporated in Legislation adopted by said County Board, employing said Ashton and said Winston as attorneys and counsellors-at-law, to prepare and file and prosecute before the Circuit and Superior Courts of Cook County, civil suits and proceedings to collect delinquent taxes, interest and penalties due on real estate in Cook County.

Winston filed his amended answer and counterclaim to said Information so amended and supplemented, and informant Courtney filed his motion to strike said answer and counterclaim on October 9, 1942 (Tr. 46-48). That motion was sustained by the Circuit Court of Cook County, and a decree entered that said Winston abided his said answer and counterclaim, and reciting "that defendant Winston take nothing by his suit and that the defendant go without day." (Tr. 49.)

Amended Answer and Counterclaim.

Winston by his pleading (Tr. 63 to 73), denies that said acts of the County Commissioners were *ultra vires* the power of the Board, and denies that the contracts for his legal services are null and void, and denies that at the time of the acts referred to no appropriation therefor was previously made, but on the contrary avers that there were a number of appropriations made by the County Board during the first quarter of the then fiscal year which were applicable to the contracts with Ashton and Winston and that said contracts were made with full power and authority of law.

The amended answer and the counterclaim proceeds to challenge the Information and its language in detail not material to this review (Tr. 63-70) and shows that the

action by the County Board was in due course of county business under the stress of depression and "tax payers strike."

The amended answer and counterclaim further avers (Tr. 70, 71) that pursuant to the said contracts, Winston in good faith put in many months of arduous professional legal labors both on the part of himself and of others under his supervision and to whom he is liable and expended large amounts of money and filed 818 suits for the collection of such delinquent taxes, penalties, costs and for the foreclosure of liens for such delinquent taxes and paid to the County moneys so collected or caused to be collected, aggregating more than Sixteen Million Dollars (358 Ill. 149). That there is due him for his services rendered under the contracts substantial compensation.

Amended answer and counterclaim further avers (Tr. 71) that the County received the benefit of said labors and expenditures by Winston and that the County of Cook and the Board of Commissioners and said Thomas J. Courtney are and each of them is and should be estopped from asserting or claiming that the contracts were or are invalid or that he, Winston, is not entitled to receive consideration therefor.

Amended answer and counterclaim further avers (Tr. 72) that before entering into the contracts the members of the County Board took counsel with Hayden Bell who was then County Attorney for Cook County, with John A. Swanson who was then State's Attorney, and with the Honorable Denis E. Sullivan who was then one of the Judges of the Superior Court of Cook County. That each of them advised the County Board that the contracts were valid and legal and proper. That the County Board acted upon such legal advice in entering into the contracts with Ashton and Winston.

Amended answer and counterclaim further avers (Tr. 72) that on the 13th day of June, 1939, the County Board and Winston entered into an accounting whereby a definite sum was found as the balance due him. That such accounting constituted an account stated. That Winston demands payment for the same, with legal interest thereon.

Amended answer and counterclaim (Tr. 50 to 54) invokes particularly Section 7 of Article X of the Constitution of the State of Illinois, which makes it the duty of the County Board to manage the county affairs. And it invokes sundry statutes of Illinois. Some of them are quoted below at the Appendix beginning on page 39. See also page 12.

Amended answer and counterclaim further avers (Abst. 56, 57) that in the numerous cases which Ashton and Winston commenced and prosecuted, the same were pending for sufficient lengths of time for the court in each case to take and have knowledge that the proceedings were conducted for and on behalf of the County by Ashton and Winston respectively, and by permitting, sanctioning and approving the acts in such cases of Ashton and Winston, respectively, while the same were so pending the court in such numerous cases in each instance by such acquiescence in effect appointed Ashton and Winston, respectively, as a competent attorney to prosecute such causes and proceedings, and the County and the County Board and the State's Attorney of Cook County then and now were and are estopped from setting up a claim that Ashton and Winston, respectively, were not properly and lawfully acting as such attorney with the same power and authority in relation to such causes or proceedings as the Attorney General or State's Attorney would have had if present and attending to the same; that because of the inability and unwillingness of the then State's Attorney of Cook County it became and was

the power and the duty of the County Board and of the County of Cook to provide and arrange to collect unpaid taxes as in and by the contracts with Ashton and Winston provided and authorized.

The fact allegations set forth by the amended answer and counterclaim of Winston (being admitted as true by the State's Attorney's motion to strike) constitute the factual background of this case.

How the Issues were Decided.

On October 23, 1942 the Circuit Court of Cook County sustained the motion of the State's Attorney to strike Winston's amended answer and counterclaim, and found as matter of law that the contracts are void; for the reason asserted that the County Board had no power or authority to contract with Ashton and Winston to perform the legal services, as set forth in the aforesaid resolutions adopted by said Board of Commissioners; on the ground that the sole and exclusive power to commence and prosecute suits and proceedings for the recovery of delinquent taxes and interest and penalties, is vested in the State's Attorney of Cook County. The decree further dismissed the counterclaim filed by Winston and ordered that the County of Cook go hence without day (Tr. 49). That decree was affirmed by the Supreme Court of Illinois and rehearing denied November 11, 1943.

In the Supreme Court of Illinois these are the Errors Relied Upon for a Reversal of the Order and Decree of the Trial Court.

(a) The court acted contrary to Statute and the Constitution and prior decisions as herein stated, in not sustaining the validity of the contracts here involved, and

erred by ordering and decreeing that said answer by Winston be stricken and that his counterclaim be dismissed.

(b) The trial court acted contrary to Statute and the Constitution and prior decisions as herein stated, in holding that the contracts and undertakings set forth in the legislation adopted by the Board of Commissioners of Cook County were *ultra vires* and beyond the power of said County Board.

(c) The trial court acted contrary to Statute and the Constitution and prior decisions as herein stated, in holding that the County of Cook was not liable for the services rendered and those moneys expended by Winston, in performing his contract and agreement with said County Board of Commissioners.

(d) The trial court acted contrary to Statute and the Constitution and prior decisions as herein stated, in not holding that the County of Cook was estopped, after receiving the benefit of the services rendered and the money expended by Winston in the performance of said contracts, from refusing to pay for such services and moneys so expended upon its order and request.

Foreword.

The opinion by the Supreme Court of Illinois, which was filed on September 23, 1943, in support of the judgment order now here under review, expressly names and repudiates its own prior decisions and interpretations of the Constitution and Statutes of Illinois (384 Ill. page 300). Upon those solemn decisions your petitioner and Cook County had acted and performed under contract. Those prior decisions and interpretations will now be mentioned in this petition as follows:

Important Illinois Cases.

Ottawa Gaslight & Coke Co., 138 Ill. 334 (1891). This was a tax suit against the Gas Company by the County of La Salle to collect delinquent personal property taxes. The declaration was signed "M. T. Maloney, County Attorney." A motion was interposed in the trial court—

> "To dismiss the suit because it had been started without authority of law and by an attorney not authorized by law to bring or prosecute the same."

The motion was supported by two affidavits; the first, by one of defendant's counsel, setting out that Maloney was not the State's Attorney of the County and that the records of the court failed to disclose "any appointment of Maloney to prosecute the case." There was also the supporting affidavit of the State's Attorney of the County, setting up that

> "He (the State's Attorney) had neither been requested to prosecute the suit nor had he been sick, absent, or unable to attend the same, nor was he interested in the subject matter of the suit; that the suit was for recovery of a debt due the State of Illinois and La Salle County; but the State's Attorney (in the absence of the disabilities referred to) was alone authorized to prosecute; and that Maloney had no legal authority to institute or prosecute the suit."

There was a counter-affidavit by Maloney, setting up

> "That he had been, by resolution of the Board of Supervisors of the County, authorized and directed to begin and prosecute the suit."

The trial court denied the motion to dismiss. A general demurrer was then interposed by the County to the declaration and the demurrer was overruled. Trial was had and judgment entered against the County for $2,597.00 and costs. On appeal the judgment was reversed by the Su-

preme Court on the ground of improper admission of evidence; but the Supreme Court specifically held that Maloney could act as counsel for the County in the further prosecution of the case. In so holding, the Supreme Court said:

> "It was not error to overrule the motion to dismiss the suit. The attorney who instituted the suit, it was shown, was in that regard acting by the direction and under the authority of the County Board; and the authority of the County Board to institute and prosecute suits for delinquent taxes, whether due upon delinquent lands or personal property, is amply given in Section 230 of the Revenue Law. (See page 39 below.)
>
> "It is contended, however, that while the authority of the County Board to cause the institution of suits for unpaid taxes is ample, it is not at liberty to select counsel but must act by and through the State's Attorney of the county." [Citing Chap. 14, Sects. 5 and 6 concerning the powers of the State's Attorney, and discussing them the Court continues:] "It would be perfectly competent for the County Board to direct the State's Attorney to recover delinquent and unpaid taxes and to prosecute the same and in such case it would be his manifest duty to act. * * * We are not disposed, however, to hold that the County Board is, by the statute defining the duties of the State's Attorney, denied the power and authority to select and empower any *competent attorney* to represent the People in beginning and prosecuting ssuits to recover delinquent taxes." (See Statutes at page 39 below.)

Here we have a specific ruling by the Supreme Court in strong language, refusing the major contention of opposing counsel. The Supreme Court, in conclusion, on this point says:

> "We have no doubt that under the general power of the County Board as the fiscal agent of the County it has the inherent right to direct the course of the proceeding [in suits to collect taxes] and to select the persons and agencies through which it will act."

Another important case which is squarely in point is *County of Franklin* v. *Layman,* 145 Illinois, 138 (1893) Affirming 43 Ill. App. 163; also 34 Ill. App. 606).

This case likewise is so important that it deserves a full analysis. The case was twice before the Appellate Court and was twice tried by the trial court before a jury. The suit was brought by certain attorneys against the county to recover for legal services furnished the county under a special contract. At the end of the first trial a verdict was returned for plaintiffs and judgment entered for $5367.76. This judgment was reversed in 34 Ill. App. 606, because of improper instructions given to the jury. On a second trial there was again a verdict for the plaintiffs for the same amount uon which judgment was entered. The second judgment was affirmed in 43 Ill. App. 163. The Supreme Court, in the case here under discussion, affirmed the Appellate Court on the second appeal.

It appears that prior to 1880 Franklin County had issued $149,000 of its bonds in aid of a railroad company, $100,000 of its bonds being based on one Enabling Act of the Legislature, and $49,000 being based on a different Enabling Act. Some years later questions arose as to the validity of the bonds and the County determined to test their validity in the courts. In pursuance of that determination, the County Board made the special contract and employed the attorneys in the case. By the terms of the contract, the attorneys were

> "To commence proper suits and prosecute the same to final determination * * * for a retainer of $250 and the additional sum of $8,000 if and when the litigation was finally determined in favor of the County."

Thereupon there ensued several years of litigation as a result of which the County was successful, first, in defeating the $49,000 issue of bonds, and later in defeating the

$100,000 issue. At the time of this trial the County had already paid the attorneys for their proportional amount of fees based on the $49,000 bond issue. After the $100,000 bond issue had likewise been held invalid the County refused to pay the balance of fees for that service and the suit was brought to recover that proportionate amount of fees. As already stated, the trial court, the Appellate Court and the Supreme Court all held that the attorneys were entitled to recover.

In its opinion the Supreme Court said, among other things:

> "It is next objected that the County could not lawfully enter into a contract to pay attorney's fees (under the facts of the case) * * * It is broadly conceded that the County had the right to test the validity of its doubtful obligations. But it is said that by the statute [Chap. 34, Sec. 33, concerning the duties of the County Board respecting suits, etc.] the power of the County Board is limited in its employment of counsel to prosecute suits in which the County is a party. We are not disposed to give this section the construction contended for it. * * *
>
> "The County Board is authorized to carry into effect the powers of the County (Chap. 34, Sec. 33) among which is to make all contracts and to do all other acts in relation to the property and concerns of the County necessary in the exercise of its corporate powers. * * *
>
> "We are of the opinion that such proceedings (as the litigation in the case) were within the spirit of the statute and that the *County Board had authority to enter into the said contract.*"

Here again we have a specific holding of the Supreme Court that the State's Attorney is not the exclusive attorney for a county board in civil proceedings; but that

where the county board determines it is necessary and desirable so to do, the county may employ outside counsel.

Another interesting case is

Wilson v. *County of Marshall*, 257 Ill. App. 220 (1930).

In that case the opinion holds that the County Board had power to make a special contract for outside attorneys, even though the State's Attorney had been available and had not been consulted. Justice Jones cites and relies on the cases of *County of Franklin* v. *Layman* and *Ottawa Gaslight Company* v. *The People*, which we have discussed above in detail.

Another important case, which arose in Cook County, is

People v. *Straus*, 266 Ill. App. 95; 355 Ill. 640.

That was a tax foreclosure suit in the Superior Court where there had been an interlocutory order appointing a receiver of a large apartment hotel. The bill of complaint had been filed in the name of the People and was signed and sworn to by "Henry M. Ashton, their Attorney and Solicitor." Ashton had been appointed attorney for the County Board by a resolution of that Board. The resolution is set out in the opinion. It refers to the nonpayment of taxes in the county over a period of years, and the Court takes notice of the recital of the resolution that there had been a vast accumulation of unpaid taxes, "thus creating an emergency situation with reference to the revenue."

It was contended by the defendant that

> "As Ashton was neither the State's Attorney nor the Attorney General * * * he had no right or authority to represent the People in the present suit and the resolution of the Board * * * employing him for the purpose therein stated was *ultra vires* and void."

The opinion in the case is by Judge Gridley and is full and exhaustive. The opinion particularly refers to the case of *Abbott* v. *County of Adams,* 214 Ill. App. 201, cited and relied on by counsel for respondents in the case at Bar, and says that that opinion "has been overruled." Judge Gridley, in his opinion, refers to an opinion of the Attorney General (Attorney General's Opinion, 1928, page 240), holding that a County Board had legal authority to employ outside counsel in proceedings for the collection of delinquent taxes. The Attorney General's opinion is discussed at length thereafter. Judge Gridley's opinion concludes on this point:

> "In view of the statutes above quoted, the holding in the *Ottawa Gaslight* Case and the resolution of the Board of Commissioners of Cook County, we are of the opinion that the contention of appellants' counsel (that the State's Attorney was the sole lawful counsel of the Board in such matters) is without substantial merit."

The Appellate Court reversed the case, only on the ground that the appointment of a trustee to take charge of and manage the property during foreclosure of the tax lien was illegal.

The case went back for trial on the merits and a decree of foreclosure was entered. The plaintiff thereupon went direct to the Supreme Court and that case is the one now to be discussed.

People v. *Straus,* 355 Ill. 640 (1934).

This was a writ of error from a decree of foreclosure of a tax lien in which there had been a decree for $165,683.99 of back taxes and a sale to the County. In the Supreme Court the County was represented by the State's Attorney, but another law firm had been substituted as associate counsel for the solicitor who had appeared for

the County at the trial. In the Supreme Court the defendant again raised the objection that the trial in the County Court had been "improper" because the County had been represented by other counsel than the State's Attorney. The Supreme Court affirmed the decree below and denied the last mentioned contention, saying on this point:

> "Numerous cases are cited tending to show that it was the proper function of the State's Attorney to prosecute the case, and there is much argument for the purpose of showing that the contract between the County Commissioners and the solicitor who appeared for the People in the trial court was contrary to public policy and void. The particular case relied on in this connection is *Fergus* v. *Russel*, 270 Ill. 304. That case is not in point here because the employment was directly attacked there and not brought collaterally, as is attempted here. In *Mix* v. *People*, 116 Ill. 265, we used the following language:
>
> " 'The collection of the public revenue is of the utmost importance and no court should allow a suit of this character to be dismissed because the solicitor who brings it may not happen to be the State's Attorney or the Attorney General. * * * There is no statute requiring a bill of this kind to be signed in the official character of either of those officers, as there is with reference to an indictment.'
>
> "It sufficiently appears that the Board of Commissioners of Cook County authorized the commencement of this suit in the name of the People and that the People ratified the action through a purchase at the foreclosure sale. Having thus authorized, approved and ratified everything that was done, it makes no difference to plaintiff in error whether or not said solicitor was duly authorized to bring this suit."

Here again we have the Supreme Court making two significant and important distinctions with respect to the

liability of the County in such cases as that now at Bar. In both cases the Supreme Court held that there was a difference between a direct attack on the right of the County Board to enter into a contract for employment of an attorney (and architect) and a case where a "collateral attack" was made after the employment had been effected and the work was done. In both cases the Supreme Court also held that where the party has accepted the benefit of the contract and the services rendered have been just and profitable to the County, it is then too late to raise even technical objections to the manner in which the contract for the employment has been made. This is an important point in the case at Bar, since it is admitted here that the contract in this case was very profitable to the County and the County was paying for the services out of extra "penalties" which were collected as a result of the tax suits started by the plaintiff as the County attorney.

Hall v. *Cook County*, 359 Ill. 528 (1935).

In our comment about the *Straus* case in the Superior Court, we referred to the case of *Hall* v. *Cook County*. The *Straus* case and the *Hall* case both establish the rule of law that the County is in a weaker position in contending that a contract for the employment of services of a professional character is invalid after the contract has been carried out and the County has received the benefit of it, than when a taxpayer's bill is filed to prevent the carrying out of the contract in advance of its execution. The *Hall* case is well known and need hardly be summarized here. The late Mr. Erich Hall, who was County Architect, recovered a judgment for $137,000 for architect's fees for services rendered in drawing plans for the defunct "Cook County Auditorium" which the County had planned to build and then abandoned. There, as here,

the State's Attorney had objected to a recovery because, as it was contended, the County had no right to make the contract, and furthermore, had not made a prior appropriation for it. In rejecting the County's contention on this point, the Supreme Court said in the *Hall* case:

> "The powers of the County are two-fold, viz.: its governmental powers and its business powers. Ordinarily, an estoppel or a waiver cannot be pleaded against a county for its failure to exercise its governmental powers, or the exercise of its governmental powers in an improper manner. This rule is not always true in the exercise of the municipality's business powers. In the cases cited by defendant * * * the assault was made by some taxpayer. * * * The same rule of strict construction should not be applied in behalf of a county where it attempts to take advantage of its own failure properly to exercise its business functions as is involved in behalf of the taxpayer who must pay the tax sought to be levied."

The earliest case which is concerned with the exact point raised by the motion to dismiss in this case seems to be

Mix v. *People*, 116 Ill. 265 (1886).

In that case the County of Kankakee filed a bill to foreclose a tax lien on some property in which Mix was interested. Foreclosure suit was begun by special counsel employed by the County and not by the State's Attornrey. The defendant contended that the County had not authorized the suit and that the solicitor for the County had, therefore, been unauthorized and the suit was unjustified. In rejecting this point the Supreme Court said in the *Mix* case:

> "Plaintiffs in error sought * * * to question the authority of complainant's counsel to bring this suit. * * * Counsel for defendants in error have presented no authorities on the subject or referred to any suit

bearing upon it. We know of none, except Chapter 14, Sections 5 and 6, concerning the duties of the State's Attorney to prosecute 'all actions and proceedings for the recovery of its revenues, moneys, fees, benefits and forfeitures accruing to the State or his County.' The collection of the public revenue is of the utmost importance and no court should allow a suit of this character to be dismissed because the solicitor may not happen to be the State's Attorney."

Dalby v. *People,* 124 Ill. 66, 75.

"As to the right of recovery for all the taxes, section 230 of the revenue law in its first clause provides that the *county board may institute suit* in an action of debt in the name of the people of the state of Illinois for the whole amount due on forfeited property; or any county, city, town, school-district, or other municipal corporation to which any such tax may be due, may institute suit in an action of debt in its own name for the amount of such tax due any such corporation on forfeited property. The second clause provide sthat the *county board may also institute suit* in an action of debt in the name of the people of the state of Illinois against any person for the recovery of any personal property tax due from such person. Thus it appears that the first clause, with respect to forfeited property, provides that the county board *may sue* for the whole amount of the taxes due on forfeited property, or only for the amount due the county; the suit in the former case to be brought by *the county board in the name of the people;* in the latter case, in the name of the county. The second clause respects personal property tax alone, and provides that the county board may also bring suit in the name of the people for the recovery of any personal property tax due from any person. Any personal property tax due from a person, embraced every personal property tax due from the person. Had the intention been to give to the county board the right of recovery only for the personal property tax due

the county, we must think the limitation to the tax due the county would have been expressly named, and the right of action have been given in the name of the county, as was done in the first clause, in providing for recovery by a county of the amount of the tax due the county on forfeited property. We think, under the section last named, the right of recovery here is for all these personal property taxes due from the defendant; and, when recovered, it will be the duty of the county board to distribute them to the several municipal corporations to which they belong, as would have to be done in the case of a recovery by the county board under the first clause of the section of the whole amount of taxes due on forfeited property.

"The judgment will be affirmed."

Attorney General's Opinion.

We have already referred, in the Appellate Court decision in the *Straus* case, *supra,* to an opinion of the Attorney General of the State on the question here under consideration. In Attorney General's Opinions for year 1928, page 239, the State's Attorney of Alexander County addressed an inquiry to the Attorney General, asking the question—

"The County Board of Commissioners would like to know if they have any authority to employ outside assistance in collecting delinquent taxes."

In answering this question in the affirmative, the Attorney General said:

"In answer to your question, allow me to draw your attention to the following cases (citing Ottawa Gas-*light & Coke Company* v. *People,* 138 Ill. 336; *Abbott* v. *County of Adams,* 214 Ill. App. 201; *Stevens* v. *Henry County,* 218 Ill. 468; *Fergus* v. *Russel,* 270 Ill. 304; and continuing): An examination of the cases of *Abbott* v. *County of Adams* (*supra*) and *Stevens* v. *Henry County* (*supra*) and *Fergus* v. *Russel*

(*supra*) shows that neither of these cases is the same as *Ottawa Gaslight & Coke Company* v. *People* (*supra*). Inasmuch as the Supreme Court has not reversed the rule stated in the case of *Ottawa Gaslight Company* (*supra*) it is my opinion that the County Board may employ a competent attorney other than the State's Attorney to represent the People in beginning and prosecuting suits to recover delinquent taxes."

The judgment and opinion by the Supreme Court of Illinois filed on September 23, 1943, now here under review, thereby expressly admits (384 Ill. at page 300) that said judgment order against your petitioner is an arbitrary departure from the established and prior law of the State of Illinois, as announced by the Supreme Court of Illinois. That is an admission that the ruling in this case is *ex post facto* as to the contract and property rights of your petitioner, and that the judgment now under review is a deliberate denial of his constitutional rights stated elsewhere in this petition. That Court said at page 300:

"The statements in those cases which are contrary to to the conclusions reached are not adhered to."

Arbitrary Action By State's Attorney.

Every county budget approved by Thomas J. Courtney for the 12 years that he has been in office from the year 1933 to the year 1944 inclusive, has provided for the employment of Special Attorneys for the County Board and for various County Officers. This action so approved by Thomas J. Courtney, State's Attorney of Cook County, is illustrated by the items from the County Budget of Cook County for the year 1943 which are reproduced below at page 38. It is unconscionable and purely autocratic for Courtney as State's Attorney, to contend as he has in this lawsuit, that the County Board has no power to employ Winston, when during the same period and under the same Constitution and Statutes, Courtney has expressly ap-

proved such County Budgets. Furthermore, it is unconscionable and purely autocratic and a wilful attempt to destroy the property rights of Winston without any process of law, when Courtney delays the conclusion of this lawsuit for ten years after 1934 when the prior ruling was made by the Supreme Court of Illinois; before he insists upon a ruling now adverse to Winston, after Courtney has joined in the contention made in the case of *People* v. *Straus*, 266 Ill. App. 95, and 355 Ill. 640, which were sustained to the effect that no parties on that record could object to the validity of the employment of Winston as counsel and attorney for Cook County, with reference to delinquent tax proceedings. This shows a deliberate intention by Courtney as State's Attorney, to reap for the County the full advantage and effect of the legal services rendered by Winston for the County, before he would bring forward for decision and conclusion the question as to payment of Winston for legal services to Cook County. We submit that is not only unconstitutional and illegal, but it is plainly immoral. That is so stated and established by many decisions of this Court.

Conclusion for Relief.

Your petitioner submits that he did not receive *due process* of law nor *equal protection* of the law, in the Courts of Illinois in this case. The action of Circuit Court and Supreme Court of Illinois was such as to call for review and reversal by the Supreme Court of the United States.

Wherefore, petitioner prays the allowance of your writ of certiorari to the Supreme Court of Illinois to the end that the cause herein may be reviewed and decided by this Court, and that the decree and orders herein may be reversed, and for such relief as this Court may direct.

WEIGHTSTILL WOODS,
Counsel for Petitioner.